No. 93-803

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

WILLIAM D. WEST,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN RESPONSE TO PETITION

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QUESTION PRESENTED

Did the court of appeals correctly hold that common law tort and contract claims seeking compensatory damages from an airline are not preempted by section 105 of the Federal Aviation Act, as that provision was construed in *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992)?

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BRIEF IN RESPONSE TO PETITION

Northwest Airlines seeks review on the grounds that the decision below (1) conflicts with this Court's decision in *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), and (2) conflicts with decisions from other circuits addressing the preemptive scope of section 105 of the Federal Aviation Act (49 U.S.C. App. § 1305).

We dispute Northwest's first point because the court of appeals correctly decided that Mr. West's claim for compensatory damages is not preempted under *Morales*. We do not, however, contest the thrust of Northwest's second point (though our analysis of the cases differs somewhat), because the circuits have analyzed the pre-emption question presented here in different ways. A decision by this Court would thus provide important guidance on an issue which

Morales did not address, *i.e.*, how precisely to identify which tort and contract claims are preempted by section 105 and which ones are not. Accordingly, we do not oppose Northwest's petition and submit that if it is granted, the Court should also grant our cross-petition, which raises the companion issue of whether a state law claim for punitive damages is preempted.

In the discussion below, we first explain why *Morales* involved a situation so distinct from the more typical tort and contract cases that additional guidance from this Court would be useful. We then address the differing approaches which the federal appellate courts have taken. Finally, we explain why, even though we do not oppose review, Northwest errs in arguing that the compensatory damages portion of the decision below conflicts with *Morales*.

1. *Morales* held that section 105 of the Federal Aviation Act, which preempts state laws "relating to" an airline's "routes, rates, or services," barred 34 state attorneys general from using state laws against deceptive practices to regulate airline advertising, explaining that section 105 was enacted as part of the Airline Deregulation Act of 1978, which was designed to give airlines greater pricing freedom. 112 S. Ct. at 2039-40.

Morales explained that its reading of section 105 was informed by Congress's use of the broad "relating to" formulation that appears in the preemption provision of the Employment Retirement Income Security Act ("ERISA"). *Morales* also looked to ERISA preemption principles when it added that section 105 does not preempt every state law that "relates to" airline routes, rates or services at some abstract level because a number of state laws operate "'in too tenuous, remote, or peripheral a manner' to have preemptive effect." *Id.* at 2040, *quoting Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n.21 (1983). Because state efforts to regulate airline advertising did not present a "borderline" case, the Court saw no need to articulate a standard for determining which state laws are preempted by section 105 and which ones survive. *Id.*

Further guidance regarding possible preemption of traditional tort and contract claims would be useful primarily because *Morales* involved an atypical set of facts -- an unprecedented attempt by 34 states to regulate airline advertising. As a result, and as the Ninth Circuit noted here, *Morales* "does not provide much guidance to

courts" when they face preemption defenses in the more typical tort or contract case involving an airline (Pet. App. A-5). The Fifth Circuit has echoed this sentiment, noting that "until recently, no one even supposed that section 1305 preempts state tort claims," but "the airlines have begun to argue that various state-law tort claims are expressly preempted" by section 105 "in the wake of *Morales*." *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350, 352 (1993).

This case, unlike *Morales*, presents section 105 preemption issues in a context where they more typically arise, and a ruling from this Court would be helpful in establishing how far section 105 reaches. Further guidance with respect to these garden-variety tort and contract claims would be particularly useful because they raise issues which this Court did not have to address in *Morales*.

First, *Morales* noted that the states' inability to regulate fare advertising would not "give the airlines carte blanche to lie to and deceive consumers," citing section 411 of the Federal Aviation Act (49 U.S.C. App. § 1381), which empowers the federal government to enjoin unfair or deceptive airline advertising, 112 S. Ct. at 2040, as well as enforcement guidelines issued by the Department of Transportation regarding advertising. *See* 14 C.F.R. §§ 399.80 - .88. But neither section 411 nor any other provision of that Act allows the recovery of damages for tort or contract claims, as this Court noted in *Nader v. Allegheny Airlines, Inc.* 426 U.S. 290, 302 (1976), which also involved the right of a bumped passenger to pursue state law claims.

Federal courts have generally not recognized the existence of federal common law tort or contract remedies in an aviation context. *Compare Moragne v. United States Marine Lines, Inc.*, 398 U.S. 375 (1970)(recognizing federal common law remedy in maritime area).[1] Thus, to the extent that traditional state law remedies are preempted by section 105, there may be no federal remedy to take their place. The elimination of state tort and contract remedies in this fashion would affect not only the rights of passengers, but

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[1] Indeed, the only opinion suggesting that federal common law exists in this area appears to be *Stevenson v. American Airlines, Inc.*, Civ. No. 92-785, 1992 WL 396792 (E.D. Pa. 23 December 1992), which involved a claim based on the in-flight death of a prize-winning dog.

airlines and third parties as well. *See Frontier Airlines, Inc. v. United Air Lines, Inc.*, 758 F. Supp. 1399, 1407-09 (D. Colo. 1989)(section 105 preempts Frontier's breach of contract claim against United over the way that Frontier's fares and flight offerings are loaded into a computer reservation system developed by United).

Second, and along the same line, *Morales*'s reading of section 105 looked to ERISA preemption principles, yet when ERISA preempted state law remedies, it simultaneously created a comprehensive scheme of federal remedies for individual plaintiffs. This case thus poses the question of the extent to which courts should look to ERISA for guidance in deciding which common law remedies are preempted by section 105 when Congress has not enacted comparable federal remedies.

Third, the case raises more starkly than did *Morales* the issue of how to read section 105 in light of the general savings clause in section 1106 of the Federal Aviation Act, which expressly preserves "the remedies now existing at common law or by statute," 49 U.S.C. App. § 1506, which was enacted in 1938 and which Congress did not alter when it added section 105 in 1978.

Finally, *Morales* involved state laws that "relate to" airline *"rates"* because they sought to dictate how those "rates" would be advertised. Here, by contrast, we deal with a state law claim that supposedly "relates to" airline *"services"* in a manner that section 105 forbids, and there is no consensus in the case law as to what "services" that provision preempts.

These factors make this case sufficiently important to warrant review of Northwest's petition and our cross-petition; we now turn to the case law construing section 105 in light of *Morales*.

2. The post-*Morales* appellate opinions show how preemption issues have arisen in various factual settings and with different analytical approaches, although most courts have ruled (as the Ninth Circuit did here) that traditional state law remedies are not preempted on the ground that they "relate to" airline "services" in a manner forbidden by section 105. Thus, one set of cases involves tort claims when passengers are killed or injured, which claims have always been pursued under state law (except in international accidents where the Warsaw Convention governs). Two circuits have held

that section 105 did not eliminate airline liability under state law in those cases. *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir.), *cert. denied*, 114 S. Ct. 291 (1993); *Public Health Trust of Dade County v. Lake Aircraft, Inc.*, 992 F.2d 291 (11th Cir. 1993). Various district courts have agreed. *Margolis v. United Airlines, Inc.*, 811 F. Supp. 318 (E.D. Mich. 1993); *Butcher v. City of Houston*, 813 F. Supp. 515 (S.D. Tex. 1993); *Burke v. Northwest Airlines, Inc.*, 819 F. Supp. 1352 (E.D. Mich. 1993).

The Fifth Circuit, by contrast, has been of two minds on this issue. In *Hodges v. Delta Airlines, Inc., supra*, that court opined that section 105 should not preempt a tort claim by a passenger who was seriously injured after being hit by luggage that fell from the overhead bin. The court did not rule for the passenger, however, because it deemed itself bound by an unpublished opinion from another panel in that circuit which held that a passenger could not pursue a personal injury claim based on a flight attendant's "negligently stomping on a passenger's foot." 4 F.3d at 355. That unpublished opinion stated that any claim that "arises out of the services" of an airline is preempted, *id.*, an approach that *Hodges* deemed unduly broad, concluding that the better approach would be to limit preemption to "services" that are part of the bargain that is struck between passenger and airline. *Id.* at 350. *Hodges* also took the unusual step of suggesting that the issue should be reheard *in banc* to resolve the conflicting views within that circuit, and a suggestion of *in banc* rehearing has been filed. *See also Smith v. America West Airlines*, 4 F.3d 356, 357 (5th Cir. 1993)(same unpublished opinion, as law of the circuit, requires preemption of negligence claim brought by passenger on hijacked aircraft; second panel notes that allowing such a claim to proceed may not interfere with airline services in a way that section 105 forbids).

Post-*Morales* appellate cases which do not involve death or personal injury have produced more varied results, although the weight of authority is against preemption. In *Anderson v. American Airlines, Inc.*, 2 F.3d 590 (5th Cir. 1993), the court held that section 105 did not preempt a Texas law insofar as it allowed an airline mechanic to sue his employer for money damages based on retaliation for his seeking benefits under that state's workers' compensation statute. Similarly, the Ninth Circuit found here that

section 105 did not preempt Mr. West's state law claim for compensatory damages under the theory that Northwest had breached an implied covenant of good faith and fair dealing. That court found that this claim was too "tenuous, remote, or peripheral" to Northwest's operations to be preempted under *Morales*, noting that federal overbooking rules expressly preserved state law remedies for passengers in Mr. West's situation.

Northwest argues (at 10-11) that the ruling below conflicts with two pre-*Morales* cases, but they are plainly distinguishable. *Illinois Corp. Travel v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990), involved an effort to regulate advertising of discount fares, a situation specifically covered by *Morales*. In *Anderson v. USAir, Inc.*, 818 F.2d 49 (D.C. Cir. 1987), the court stated in *dictum* that section 105 would preempt a purported state law claim that an airline failed to provide "courteous service" when it refused to seat a blind passenger in an emergency exit row. We do not quarrel with that limited finding of preemption, although we submit that the proper analysis would have been to ask whether state laws seeking to regulate emergency evacuation procedures conflict with federal safety rules issued under other sections of the Federal Aviation Act.[2]

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[2] An example of the correct analysis appears in *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989), which held that the air safety provisions of the Act preempt a state law barring drug testing for pilots. That methodology is preferable to going through contortions to show that state tort claims somehow "relate to" airline "services" in a way that Congress envisioned when it enacted section 105. The same analysis could apply to preempt other state law claims without addressing section 105, for example, a claim that a passenger was falsely arrested because the pilot refused to let him disembark a delayed flight.

We make two distinct points here. First, the question presented here is not whether state common law remedies, *as a body*, are or are not preempted. *Morales* plainly teaches that some are, while others are not, and the only issue is how and where to draw the line. Second, one need not distort the intent or language of section 105 in order to conclude that specific claims are preempted because other provisions of the Act may properly and more easily produce the same result.

The only post-*Morales* appellate ruling that is arguably out of step with the results in other post-*Morales* cases is *Statland v. American Airlines, Inc.* 998 F.2d 539 (7th Cir.), *cert. denied*, 114 S. Ct. ___ (1993)(No. 93-604). The plaintiff in *Statland* sued in federal court for a $1.25 refund, on the theory that when an airline exacts a cancellation penalty which is stated as a percentage of the total fare (including a ten percent federal ticket tax), the airline must return that portion of the penalty which reflects the amount paid as tax. The district court dismissed the suit *sua sponte* for lack of subject matter jurisdiction and declined to exercise supplemental jurisdiction over the passenger's state law claims for breach of fiduciary duty, violation of Illinois' consumer fraud statute, conversion and breach of contract.

The Seventh Circuit affirmed the finding of no subject matter jurisdiction; it then reached out to decide whether section 105 preempts the passenger's state law claims "in order to conserve the resources of Illinois state courts." 998 F.2d at 541. In a brief discussion, the court of appeals deemed it "obvious that canceled ticket refunds relate to rates" within the meaning of section 105, which does not allow states to "regulate American's ticket refund practices either by common law or by statute. This sweeps aside Statland's state law claims." *Id.* *Statland* did not analyze or even cite the Ninth Circuit's decision here in reaching this conclusion.

It might be argued that technically no conflict exists between *Statland* and this case because (1) *Statland* involved ticket refund practices, whereas this case involves overbooking, and (2) the plaintiff in *Statland* was pursuing claims for conversion, breach of fiduciary duty and the like, whereas Mr. West is pursuing a different claim for breach of an implied covenant of good faith and fair dealing. One might also argue that the Seventh Circuit's preemption discussion is *dictum*, since the court conceded that there was no need for it to reach the issue, and Illinois state courts may well reach the opposite conclusion.[3] Finally, one might argue that

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[3] Indeed, the Illinois Supreme Court is presently considering the application of section 105 to various state law claims involving changes in an airline's frequent flyer program in another case which this Court remanded for further consideration in light of *Morales*. In its first decision in that

Morales is barely a year old, that any tension between the approach here and in *Statland* is tolerable at this time, and that the Court should not step in until lower courts have had additional opportunity to formulate approaches for divining which state law claims are preempted by section 105 and which ones are not.

While such arguments might counsel against granting review in other situations, we submit that the lack of guidance provided by *Morales* and the varying approaches taken by lower courts in its wake argue in favor of granting review here. *Statland*'s broad reading of section 105 suggests that the Seventh Circuit would find claims such as Mr. West's preempted. In fact, the Fifth Circuit in *Hodges* noted its disagreement with the result reached by the Ninth Circuit here, stating in a conclusory fashion that state law claims involving overbooking "relate to" airline "services" in a way that requires their preemption by section 105. 4 F.3d at 356. That *dictum* suggests that wherever the Fifth Circuit may draw the line between preempted and non-preempted claims, Mr. West's claim would be preempted in that circuit.

3. Although we do not oppose review being granted, we in no way concede that Mr. West's claim is preempted or that the decision below conflicts with *Morales*. Northwest's argument on this point proceeds on the erroneous assumption that Mr. West is seeking to dictate what "services" Northwest offers the public and that section 105 preempts such regulation. Not so. Here, as in *Nader v. Allegheny Airlines, supra*, the state law claim focuses on inadequate notice about the alleged "service" being offered without trying to regulate any "service" the airline chooses to offer.

Moreover, there are several reasons why Mr. West's claim does not relate to any "services" that section 105 preempts. First, cases such as *Hodges* which have grappled with the question of how to construe that provision have curiously overlooked the fact that Congress used the words "service" and "services" quite narrowly in other provisions of the Federal Aviation Act to describe various

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case, the Illinois court held that such claims were not preempted by section 105. *Wolens v. American Airlines, Inc.*, 147 Ill. 2d 367, 168 Ill. Dec. 133, 589 N.E.2d 533 (1991), *vacated and remanded*, 113 S. Ct. 32 (1992). The case has been reargued and is awaiting a decision.

types of airline operations, *e.g.*, scheduled passenger flights, cargo charter flights, air ambulances, intrastate flights, etc.[4]

This narrow reading of "services" is consistent with Congress's goal in the Deregulation Act of preventing the states from trying to dictate only on what "routes" an airline can fly or what "rates" to offer, but also what type of "services" it planned to operate. There was surely no intent to displace state law as broadly as Northwest argues here, and a case which nicely illustrates the reach of section 105 is *Hiawatha Aviation of Rochester, Inc. v. Minnesota Dep't of Health*, 389 N.W.2d 507 (Minn. 1986), which held that section 105 barred the state from licensing air ambulance companies which sought to offer that "service" to the public, although the state could regulate areas traditionally left to them, such as qualifications of medical personnel employed by an air ambulance company.

Second, even if the word "services" may properly be construed to mean one thing in section 105 and another thing elsewhere in the Act, an alternative interpretation, embraced by the Fifth Circuit in *Hodges*, does not preempt Mr. West's claim here. This alternative interpretation of "services" in section 105 rests on an interpretative rule issued by the Civil Aeronautics Board in which the Board stated that section 105 preempts "all of the economic factors that go into the provision of the *quid pro quo* for passenger's [sic] fare." 44 Fed. Reg. 9948, 9951 (15 February 1979), *quoted in Hodges, supra*, 4 F.3d at 354. Even under this standard, however, Mr. West's claim does not challenge any part of the "service" bargain. The thrust of his claim is failure to provide accurate notice of what

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[4] Thus, section 404(a) of the Act (49 U.S.C. App. § 1374(a)) imposes on airlines a duty to provide "safe and adequate service, equipment and facilities," as well as "reasonable through services" with airline offering connecting flights. Section 401(e)(6) (49 U.S.C. App. § 1371(e)(6)) states: "Any air carrier, other than a charter air carrier may perform charter trips (including inclusive tour charter trips), or any other special service, without regard to the points named in its certificate, or the type of service provided therein, under regulations prescribed by the Board." Despite these provisions, the Ninth Circuit took a broad view of the word "services," deeming itself bound by a more expansive reading of that word in a prior decision in that circuit (Pet. App. E-4).

exactly was being offered.

Finally, no conflict exists between the ruling below and *Morales* because, as that case observed, section 105 was enacted to "ensure that the States would not undo federal deregulation with regulation of their own." 112 S. Ct. at 2034. No such interference will occur here, and in any event, it is difficult to see how the federal interest is somehow compromised when, as the court of appeals noted, federal rules promulgated under another provision of the Federal Aviation Act require airlines to advise bumped passengers of their right to pursue whatever common law remedies are available to them, advice that would be meaningless and misleading if, as Northwest argues, no such remedies exist (Pet. App. A-5 - A-7).

CONCLUSION

For these reasons and those stated in our cross-petition, the petition and cross-petition should be granted.

Respectfully submitted,

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